

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

DOCKET NUMBER

74-1205

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EMANUEL C. RUSSO, :

PLAINTIFF-APPELLANT :

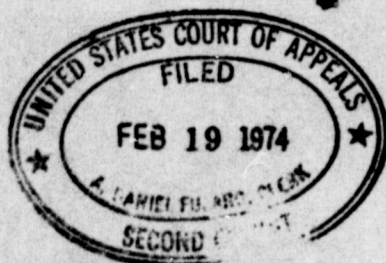
VS. :

LOCAL UNION 676 OF THE :
UNITED ASSOCIATION OF :
PLUMBING AND PIPEFITTING :
INDUSTRY OF THE UNITED STATES :
AND CANADA, ET AL, :

DEFENDANTS-APPELLEES :

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR PLAINTIFF-APPELLANT



NORMAN ZOLOT
9 WASHINGTON AVENUE
HAMDEN, CONN. 06518

TO BE ARGUED BY:

NORMAN ZOLOT, ESQ.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EMANUEL C. RUSSQ,

Plaintiff-Appellant

vs.

DOCKET NO. 74-1205

LOCAL UNION 676, UNITED ASSOCIATION
OF PLUMBING AND PIPEFITTING INDUSTRY
OF THE UNITED STATES AND CANADA, ET ALS

BRIEF FOR PLAINTIFF-APPELLANT

PRELIMINARY STATEMENT

This is an appeal from an order and judgment rendered by the Hon. Jon. O. Newman, a judge of the United States District Court for the District of Connecticut dismissing plaintiff's complaint for failure to state a cause of action upon which relief may be granted and dissolving a temporary restraining order issued by him on January 7, 1974. A copy of his decision is contained in the Appendix to the Brief, at page 13.

STATEMENT OF ISSUES

The basic issues involved in this case are:

(1) Did the trial court err in dismissing the complaint for failing to state a cause of action under section 101(a)(1), (2) and (5) of the Labor Management Reporting and Disclosure Act, 29 U.S.C. 411(a)(1), (2) and (5) where the complaint alleged that plaintiff rights as a member of defendant Labor Organization were violated because (1) supervisors, foremen and owners who were members of the defendant labor organization were permitted to (a) participate in the nomination and election of officers responsible

for the negotiation of a collective bargaining agreement and for contract administration and (b) accept such offices, contrary to the federal labor law policy as set forth in the Labor Management Relations Act of 1947, 29 U.S.C. 157, et. seq. and (2) individual defendants have taken reprisal actions against plaintiff for his refusal to cease prosecution of an unfair labor practice with the National Labor Relations Board which alleges that supervisors, foremen and owners unlawfully participated in negotiations with an employer association and in the acceptance of such an agreement by reducing his term of office as a business manager.

(2) Should the trial court have maintained pendent jurisdiction over the subject matter and extend granted plaintiff's motion for Temporary Injunction while the N.L.R.B. prosecuted to completion the unfair labor practice complaint and while the Secretary of Labor investigated plaintiff's objections to the election predicated on the participation by supervisors, foremen and owners in the nomination and election procedures.

STATEMENT OF THE CASE .

A. Prior Proceedings Below:

This is an appeal from the decision of the Hon. Jon. O. Newman, of the District of Connecticut dismissing plaintiff's complaint for failure to state a cause of action upon which relief may be granted, and his temporary restraining order dated January 4, 1974. (App. 1)

The complaint was filed on January 7, 1974 asserting that plaintiff's rights as a member of a labor organization under sections 101(a)(1),(2) and (5) of the LMRDA were violated, and the trial court issue a temporary restraining order maintaining the status quo until hearing. On January 17, 1974, defendants filed a motion to dismiss the complaint on the ground that the court had no jurisdiction to grant relief in this matter and to deny injunctive relief. (App.,12) On that date, the trial court heard plaintiff's evidence. On February 7, 1974, the trial court sustained defendants' motion to dismiss and dissolved its temporary restraining order. (App.,13) This appeal is from such decision and order made pursuant thereto. (App.,26)

B. Statement of Facts^{1/}

The defendant Local Union 676 a labor organization was organized and chartered by the parent organization, United Association of Plumbing & Pipefitting Industry of the United States and Canada, as a result of a General President's decision in November 1970. In January, 1971, its formation was approved, subject to the adoption of local union Constitution and By-Laws and its acceptance of a pre-existing agreement between Local 669 and the National Automatic Sprinkler and Fire Protection Association (NASFPA) for the remainder of its term. The Local Union did adopt its own Constitution and By-Laws which was accepted by the International Union. The By-Laws provided for the nomination of officers, including the

^{1/} This is based primarily on the Court's Findings stated in its opinion.

Business Manager, in March and the election in April for a three year term. (Ex. A, App. 27) Pursuant to the approved By-Laws, notice of election was sent to all members and plaintiff was elected to a three year term commencing April 6, 1971.

Plaintiff carried out his duties as Business Manager without any interference with his activities, and without any "log" showing his daily activities. Pursuant to his duties, he also undertook early in 1973 to prepare for negotiations for a new agreement for the Local Union with the Association. He and the negotiating Committee (the Executive Board members other than the Financial Secretary) met with the Association representatives. As a result of such negotiations, a proposal was prepared for submission to the membership of the local union. However, prior to such submission, the plaintiff consulted with legal counsel concerning the NASFPA proposal and the procedure to be followed at the union meeting with respect to a vote on the proposal. At that time, he informed legal counsel that members of the Negotiating Committee were supervisors and foremen for various employers which were members of the Association. He was advised that under the federal labor law, owners, supervisors and foremen cannot participate in matters dealing with negotiations and the administration of the collective bargaining agreement without endangering the status of the union as a bargaining representative of journeymen and any agreement which might be consummated.

The plaintiff reported to the membership the advice received from counsel. He requested all members in such categories to re-

frain from voting on the agreement. The defendant Negotiating Committee members ignored this request and insisted upon voting on the contract along with all other supervisors, foremen and owners then present. The proposal was nonetheless rejected. Immediately after the meeting was adjourned, the Negotiating Committee members demanded a conference with legal counsel. That day, such a conference was held. Defendants, members of the Negotiating Committee by virtue of their respective officers, were told that as supervisors and foremen they could not serve on the Negotiating Committee and should not vote on any agreement. In addition, the members who were owners were similarly disqualified under federal labor law, as well as the terms of the United Association Constitution. Ex. A-1, sec. 178. These defendants were displeased with the information received.

Despite this advice, the defendants met with representatives of the representative of the National Automatic Sprinkler & Fire Protection Association, and purported to reach an agreement with him. When this was made known to plaintiff, he protested the manner in which negotiations were being conducted by such defendants and refused to sign the agreement for the local union. Indeed, he tore up the documents when tendered to him. The defendant members of the Negotiating Committee received other copies from NASFPA and executed them despite plaintiff's objections.

Thereafter, the plaintiff filed a charge with the National Labor Relations Board against the National Automatic Sprinkler

& Fire Protection Association. The charge was investigated, and as a consequence of such investigation, General Counsel issued a complaint, in case number 1-CA-9020. Ex. D. The complaint, in essence, sustained plaintiff's contentions. The complaint is currently awaiting hearing and is subject to further investigation by the General Counsel.

The filing of the charge started a series of acts against the plaintiff. The defendants persuaded the membership to demand a "log" from the Business Manager, and refused to pay him his legitimate business connected expenses. They attempted to force plaintiff to withdraw his charges pending before the NLRB with the threat that he would be removed. Defendants brought charges against plaintiff under the United Association Constitution at the June 1973 meeting. (These charges have not been processed to date.) More importantly, they secured a vote to discontinue payment for the "Dodge" reports which are vital for effective policing of construction jobs, particularly for the purpose of determining who was bidding for work within the union's trade jurisdiction and who was doing such work and where. The lack of such reports prevented plaintiff from securing work for the rank-and-file members.

For reasons which were not set forth at the hearing, the defendant Executive Board members informed the membership that it was "necessary" to amend the local union By-Laws to change the local union's nomination date from March to November, and the election date from April to December, allegedly in order to comply with the provisions of the United Association Constitution.

Ex. A-1, sec.130(a). The same provision, however, was in force in 1971 when the By-Laws (Ex. A) was adopted by the membership and approved by the United Association. The only change in local union by-laws required by the United Association as a result of the 1971 amendments to its Constitution was one "to provide for the filling of vacancies in Local Union offices." (Ex. A-1, sec. 130(c)). Since such an amendment, if valid, would shorten the term of office by approximately five months, the motivation for the defendants' action is clearly to oust the plaintiff because of his insistence that the defendant negotiating committee members cease and desist from interfering with the labor management functions of the local union and permit supervisors, foremen and owners to dominate all aspects of the defendant labor organization's activities.

Plaintiff protested the amendments, but his voice was lost at the meeting at which supervisors, foremen and owners attended and voted. Thereafter, a nomination meeting was held and supervisors, foremen and owners participated in the nomination process. The defendants named in paragraph 23 were nominated by supervisors and foreman. The defendants so named, except for Ronald Zimmerman were themselves supervisors and foremen. Zimmerman was nominated by a supervisor and that nomination was seconded by another supervisor.

The plaintiff protested the nomination process, but his protest was denied by the General President of the United Association.

At the election held in December 1973, supervisors, foremen and an owner participated in the voting. The defendants named in paragraph 23 of the complaint were elected to the Executive Board and as Business Manager. The plaintiff was defeated for the Business Manager office by a 61-13 vote. He filed further protests against the election process on grounds which included the participation of supervisors, foremen and owners in the election procedures. On January 6, 1974, he was orally informed that his protests were denied by the General President.

The present action was instituted to protect and preserve plaintiff's rights as a member of the defendant labor organization under section 101(a)(1)(2) and (5) of the LMRDA and in connection therewith to preserve the status quo through a restraining order preventing defendants named in paragraph 23 of the complaint from taking their respective offices until the National Labor Relations Board rules on the General Counsel's complaint, or until the process by which ineligible members of the defendant union are permitted to participate in the negotiation and administration of the collective bargaining agreement is corrected, but not earlier than April 6, 1974 when the plaintiff's term of office expires. Plaintiff also sought a declaratory judgment that as a matter of law supervisors, foremen and owners who are members of the defendant organization may not participate in the union's internal affairs with respect to matters involving negotiations and administration of the contract, directly or indirectly. The trial court dismissed the complaint for failure to state a cause upon

which relief may be granted and plaintiff now appeals that decision.

ARGUMENT

I

PLAINTIFF'S RIGHTS AS A MEMBER OF A LABOR ORGANIZATION UNDER SECTION 101(a)(1) OF THE LMRDA ARE VIOLATED WHEN SUPERVISORS PARTICIPATE IN MEETINGS AND ELECTION PROCESS AND OWNERS PARTICIPATE IN MEETINGS DEALING WITH ACCEPTANCE OF COLLECTIVE BARGAINING AGREEMENTS AND IN THE NOMINATION AND ELECTION OF OFFICERS OF A LABOR ORGANIZATION CHARGED WITH NEGOTIATION OF A COLLECTIVE BARGAINING AGREEMENT AND THE ADMINISTRATION OF SUCH AGREEMENT.

1. It is contrary to public policy for supervisors and owners to interfere in the collective bargaining process of involving union members under section 7 of the NLRA.

As the trial court recognized, it is now the settled law that supervisors and owners may not participate in the affairs of a labor organization with respect to those matters which involve, directly or indirectly, the negotiation of a collective bargaining agreement or the administration of such agreement without violating the rights of union members protected by section 7 of the NLRA. Nassau & Suffolk Contractors' Association Inc., 118 N.L.R.B. 174, 183-84 (1957); Detroit Association of Plumbing Contractors, 126 NLRB 1381, enf'd in part, 287 F. 2d 354, C.A.-D.C., 1961); Bottfield Refractories Co., 127 N.L.R.B.

188, enf'd 292 F. 2d 627 (C.A. 3, 1961); Powers Regulator Co.
149 NLRB 1185 , enf'd 355 F. 2d 506 (C.A. 7, 1966); Screw
Conveyor Division (Jeffrey Mfg. Co.) 1974 CCH NLRB par. 26,090)
Cf. Eastern Missouri Contractors Ass'n and Carpenters Council
of St. Louis and Vicinity. 180 NLRB 509 (1970)

It is therefore evident that it is contrary to public policy to permit supervisors and owners who are members of a labor organization to hold offices which entail negotiation of an agreement or its administration, including participation in union meetings and in the process whereby members who have such responsibility are selected. While the provisions of section 8 (b)(1)(A) of the Labor-Management Relations Act of 1947 literally permits a labor organization subject to that Act to prescribe its own rules with respect to the acquisition and retention of membership, such labor organizations may not take action against supervisory or management personnel in the labor management areas involved because of the conflict of interest in existence. Indeed, recent NLRB decisions emphasize the fact that supervisors may not be fined or otherwise disciplined for carrying out management functions in the labor relations area, although such activities may be a violation of their obligations as members of the labor organization.^{1/}

1/ Local Union No. 2150 IBEW (Wisconsin Electric Power Company),
192 NLRB 77,78, enf'd ____ F. 2d ____, 83 LRRM 2827 (C.A. 7, 1973);
New Mexico District Council of Carpenters (A.S. Horner, Inc.) 177
NLRB 500, enf'd 454 F. 2d 1116 (C.A. 10, 1972); Sheet Metal Workers
Local 361 (Langston & Co., Inc.), 195 NLRB 355, enf'd 477 F. 2d 675
(C.A. 5, 1973); New York Typographical Union No. 6, I.T.U., AFL-CIO

Given the facts that in 1947, the Taft-Hartley amendments to the NLRA excluded "supervisors" from the term "employee" and the 1957 decision of the NLRB in Nassau & Suffolk Contractors, supra, it might be anticipated that the legislative history of the LMRDA would indicate some Congressional consideration of the potential conflicts between Title I and IV of that Act and the principles set forth under NLRA. Unfortunately, there is little light provided.^{2/} The original Senate bill proposed by Senator Kennedy would have limited the election, reporting and trustee provisions to employees and labor organizations subject to the NLRA.^{3/} The evidence before Congress showed that abuses existed in labor organizations which were not subject to the NLRA and this led Senator Smith of New Jersey to propose an amendment which would define the term "employee" to include those labor organizations composed of employees not covered by the NLRA, such as agricultural workers, supervisors and others, such as Railway employees.^{4/} The Landrum version in the House contained the present definition of the term without any discussion.

1/(Cont.) (Daily Racing Form) 206 NLRB No. 83. There is, however, a developing conflict of opinion in this area, as shown by IBEW, Local 134 (Illinois Bell Telephone Co.), 192 NLRB 85, rev'd F.2d _____ 83 LRRM 2582 (C.A.D.C. 1973); Cert. granted, Dkt. 73-566, 73-795, Newspaper Guild, Erie Newspaper Guild, Local 187 v. NLRB, F.2d _____, 84 LRRM 2896 (CA 3, 1973) based upon lack of proof that supervisors were disciplined for performance of supervisory work as opposed to rank-and-file work.

2/ Legislative History of the LMRDA, p. 190, 191, 195, 198, 228-231, 233.

3/ Ibid, p. 190

4/ Ibid, p. 191

The legislative history of section 101(a)(1) indicates that the original version proposed by Sen. McClellan for literally "equal" rights in all matters specified in that section was diluted by Sen. Kuchel's amendment to add permit labor organizations to adopt "reasonable rules and regulations in such organization's constitution and bylaws." (Legislative History, page 287.) This change permitted labor organizations to follow a "rule of reason" and to oust "known Communists and criminals" which would not have been possible under the McClellan proposal. (Ibid, page 286).

The Secretary of Labor has recognized both the impact of NLRA and the Nassau-Suffolk Contractors decision in interpreting whether or not a union rule which prohibits supervisors and owners from participating in nomination and election of officers is "reasonable" under the terms of section 101(a)(1) and 401(e) of the Act.

While the LMRDA defines a member without any reference to his status as an owner, supervisor, foreman or journeyman or apprentice, and specifically protects the labor organization in its formulation of rules and regulations under section 101(a)(1) and 101(a)(2) of the Act, the Secretary of Labor in section 452.47 of his Interpretations (LRX 7140c) holds that:

§ 152.17 Employer or supervisor members.

Inasmuch as it is an unfair labor practice under the Labor-Management Relations Act (LMRA) for any employer (including persons acting in that capacity) to dominate or interfere with the administration of any labor organization, it follows that employers, while they may be members, may not be candidates for office or serve as officers. Thus, while it is recognized that in some industries, particularly construction, members who become foremen, supervisors, or contractors traditionally keep their union membership as a form of job security or as a means of retaining union benefits, such persons may not be candidates for or hold office.² Whether a restriction on officeholding by members who are group leaders or others performing some supervisory duties is reasonable depends on the particular circumstances. For instance, if such per-

² *Shultz v. Local 1291, International Longshoremen's Association*, 338 F. Supp. 1204 (E.D. Pa.), *aff'd*, 461 F.2d 1262 (C.A. 3, July 20, 1972).

³ See *Nassau and Suffolk Contractors' Association*, 118 NLRB No. 13 (1957). See also *Local 636, Plumbers v. NLRB*, 287 F.2d 354 (C.A. D.C. 1961).

sons might be considered "supervisors" under the LMRA, their right to be candidates under the Act may be limited. Another factor in determining the reasonableness of a ban on such persons is the position (if any) of the NLRB on the status of the particular employees involved. If, for example, the NLRB has determined that certain group leaders are part of the bargaining unit, it might be unreasonable for the union to prohibit them from running for office. An overall consideration in determining whether a member may or may be denied the right to be a candidate for union office as an employer or supervisor is whether there is a reasonable basis for assuming that the person involved would be subject to a conflict of interest in carrying out his representative duties for employees and rank and file union members.

⁴ Under section 2(11) of the Labor Management Relations Act, supervisors include individuals "having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

The Secretary of Labor's Interpretation lends force to the claim that as a matter of public policy, supervisors and owners may not participate in the nomination and election processes with respect to officers concerned with matters cognizable under the NLRA. Were such a rule present in the defendant local union's Constitution and By-laws, he would undoubtedly accept the same, and could under Title IV of the Act provide plaintiff with relief as sought.

However, there is no such restriction in defendant's Constitution and By-laws upon those classes of members. They are, moreover, not only exercising all rights of membership, including voice and vote at all meetings on all matters, but they dominate the Negotiating Committee. The exercise of literally "equal" rights as members by supervisors and owners dilutes the rights

of the rank and file members and jeopardizes essential elements provided by law to further the national labor policy expressed in the NLRA to promote labor stability through effective collective bargaining for "employees" as defined by that Act. Thus, if supervisors and owners, as defined by that Act, exercise their literal rights under section 101(a)(1) they dilute the voting strength of those members who are employees entitled to the protection of the NLRA and jeopardize their rights thereunder.^{1/} Here, there are approximately an equal number of rank-and-file employees and supervisors and owners. They thus can neutralize the voting power of these "protected" employee-members. By their control of the work force, reinforced by immunity from disciplinary action for exercising their "supervisory" functions, supervisors and owners can dominate and coerce the rank-and file members, and have, in fact, done so. Such activities are unlawful and subject to judicial restraint.

2. The trial court had jurisdiction to grant relief to to plaintiff under section 102 of the LMRDA.

Since the individual named defendant supervisors and owners are acting under color of right as members of defendant labor organization under section 101(a)(1), there is only one method by which the rights of rank-and-file employee-members can be protected if section 101(a)(1) is to be applied "reasonably" and that is to restrain these defendants from participation in such matters. What is sought is a protection of voting rights of a class against unlawful acts of another class. Since there is, in effect, a violation and infringement of the voting rights

^{1/} The anti-trust implications are evident. USM v. Pennington, 381 U.S. 657 (1965).

of plaintiff as a rank-and-file member under section 101(a)(1), a cause of action has been stated for which the trial court may grant relief.

It should be noted that despite his Interpretation, there is no assurance that the Secretary of Labor would have the authority under Title IV of the LMRDA to provide protection to plaintiff in this area. His authority so far has been exercised to ascertain whether a rule which limits the right of a member in good standing to participate in and vote in an election is a "reasonable" one, which is uniformly applied. No cases have been found where the Secretary has sought to set aside an election because supervisors and owners who were otherwise eligible to vote because of their membership in the local union did so on the grounds that such participation was contrary to public policy. For the Secretary of Labor to sustain plaintiff's complaint and effectuate the national labor policy expressed in the NLRA, it would be necessary for him to hold that it is "unreasonable" to enforce a rule which permits all members to participate in the election process, particularly with respect to negotiations and contract administration.

Similarly, there is no assurance that the NLRB after hearing the complaint can extend plaintiff relief by way of disenfranchising supervisors and owners. The NLRB can order an employer to cease doing business with a union dominated by supervisors or owners, but it cannot order such classes of members to refrain from participating in the election process or holding office within the union in the areas subject to the NLRA. The usual remedy is to direct the employer to cease doing business or

recognizing the union so long as it is controlled by supervisors and owners who participate in all union affairs without restraint of law.

The trial court held that since plaintiff failed to allege "discrimination among union members in the exercise of the franchise rather than rules concerning who is eligible for election" there is no cause of action stated under the holding of Calhoon v. Harvey, 379 U.S. 134, 57 LRRM 2561 (1964) and this court's decision in Schonfeld v. Panza, 477 F. 2d 899, 904 (C.A. 2, 1973). It is submitted that there is, in effect, discrimination insofar as the rules for participation adopted by the defendant labor organization which is otherwise subject to the NLRA results in granting an ineligible class of members the right to vote on matters which as a matter of law they are forbidden to do so. The discrimination runs against the rank-and-file member-employees as the trial court should have recognized. These rules infringe upon their rights. "The prevailing premises" of Titles I and IV of the LMRDA, as Justice White said in American Federation of Musicians v. Wittstein, 379 U.S. 171, 57 LRRM 2566, 2571 (1964) "is that there should be full and active participation by the rank and file in the affairs of the union." (Emphasis added.) There are obviously circumstances where full "equal rights" cannot be granted to all members, and the facts here present such a situation which is limited by the terms of section 101(a)(1) in order to protect such rank and file members.

In Penza, this court held that the competing values between Title I rights and Title IV procedural requirements are best reconciled by limiting initial federal court intervention to cases

where union action abridging both Title I and Title IV can be "fairly said, as a result of union history or articulated policy, to be a part of a purposeful and deliberate attempt by union officials to suppress dissent within the union." We submit that the record here shows such purpose where defendants defiantly continue to participate in matters which are outside their rights as members. The pre-Panza decision of Judge Lasker in Schonfield v. Raftery, 335 F. Supp. 854, 79 LRRM 3013 (S.D.N.Y. 1971) supports plaintiff's position, but the post-Panza decision by Judge Bricant in Schonfield v. Raftery, 359 F. Supp. 380, 83 LRRM 2263 (1973) does not. It is submitted that the reasoning of Judge Lasker which recognized that a cause of action is provided under section 101(a)(1) where there was shown to be a scheme for electing officers charged with negotiations which diminished the right of certain union members where the selection of negotiators fell within the scope of the members' voting rights because the court had the authority to determine whether the union's constitution and by-laws for the selection of such committee were reasonable under Title I. Judge Bricant, however, held that under Panza, the issue was "cognizable only under Title IV, section 401(e) of LMRDA. as to which there may be no access to this court which by-passes the Secretary of Labor." (83 LRRM 2272). Here, by the exercise of voting rights for negotiators and accepting such offices, it is submitted that defendants are suppressing the dissent from the rank and file members against such activities which plaintiff has protested. Such voting, moreover, is the type of discrimination against rank and file member-employees which is both contrary to public policy and is an unreasonable exercise of membership

privileges. Such a discriminatory rule takes this case out from the Calhoon holding and provides a cause of action under Title I. The eligibility to participate as office holders for offices not involving negotiations and contract administration is not an issue here. What is here is whether defendants may exercise their voting rights with respect to selection of officers so charged or whether they may hold such offices. Their exercise of such rights as members is, we submit, discriminatory under section 101(a)(1). Cf. DePew v. Edmiston, 386 F. 2d 710, 66 LRRM 2663, 2664 (C.A. 3, 1967).

In Navarro v. Gannon, 385 F. 2d 512, 66 LRRM 2657, cert. den. 390 U.S. 989 (C.A. 2, 1967) this court sustained the issuance of a temporary injunction restraining an International Union President from attempting to control a local union meeting without complying with the trusteeship provisions of Title III of the Act. This court held that such action was a violation of the rank and file members rights under sections 101(a)(1) and (2) to hold meetings without the inhibiting presence of and control by the International President or his representatives. The President's action was deemed an invasion of the members' right of free discussion under such sections of the Act, and jurisdiction existed under section 102. It is submitted that from the facts here, the supervisors and owners, under a color of right as members, are similarly attempting to invade the provinces which the NLRA has declared belong to the rank and file members. By

analogy, a violation of rank and file members rights under NLRA by a class composed of supervisors and foremen should be treated in the same fashion as an unlawful trusteeship, with respect to the attempted interference with rank and file members right to select their own negotiating representatives and Business Manager free from "outsiders".

In Local 13410 v. United Mine Workers, 475 F. 2d 906, 82 LRRM 2206 (C.A.D.C., 1973), a trial examiner for the NLRB had ruled that an employer had violated the act as a result of the participation of its supervisory personnel in the internal affairs of the local union. He recommended that the local union be disqualified from representing the employees of the employer because of the conflict of interest found to exist. The local union decided to take a secret ballot on a resolution to determine whether it should disaffiliate from its parent organization. It notified each of the alleged supervisors of their ineligibility for membership and that they were not eligible to vote on the resolution. The International promptly imposed a trusteeship without hearing on the ground that the "disqualification of the supervisors.... constituted a breakdown in democratic procedures." The local union resisted. The court noted that if there was an expulsion of the supervisors, it was not by way of discipline, that is, to punish them, but rather to comply with a decision of the NLRB Examiner. The Local Union was therefore not obligated to conform to the specific provisions of section 411(a)(5) of the Act with respect to charges. It also noted that "strictly speaking, the Local may not have been obligated to expel supervisors since such individuals may be non-voting members of union. The Local could

simply amended its by-laws to provide for this special non-voting status..." It is this relief and limitation upon the rights of supervisors and owner members which plaintiff believes is required if the provisions of Title I and the NLRA are to be reconciled. This is a problem which, it is submitted transcends the "voting eligibility" situation presented by Calhoon which does state a cause of action under section 101(a)(1) of the Act.

3. The court has pendent jurisdiction over the parties to stay the installation of officers until the NLRB or the Secretary of Labor complete the processing of the complaint by the General Counsel for the NLRB or by the Secretary of Labor, and ought to have exercised such jurisdiction to preserve the status quo.

In this case, plaintiff has contended that the NLRB complaint (Ex. D) may result in an order which would require the supervisors from ceasing and desisting from actively participating in internal union matters affecting negotiations and the administration of the agreement, and the likelihood of prevailing is great, but not certain, and that there is an existing complaint with the Secretary of Labor directed at the unreasonableness and illegality of the defendant local union's eligibility rules for nomination and election under Title IV. It therefore requested the trial court to protect the rank and file members, including plaintiff, by restraining employees from continuing to participate in such union matters and from taking or holding union offices involved in such functions, even if there is no cause of action stated under Title I since there is need to

preserve the status quo until the NLRB shall have resolved the complaint and until the Secretary of Labor shall have made a determination under Title IV of the Act. This suggested relief was one which this court in Penza specifically did not rule upon (see footnote 7, thereof). However, in Libutti v. DiBrizzi, 343 F. 2d 460, 58 LRRM 2846 (C.A. 2, 1965), this court held that the district court had pendant jurisdiction over a New York state-law claim made by union members whose nominations for office were rejected by a union committee that was not authorized to do so by the union constitution and by-laws. In its opinion, the trial court indicated that there may be a state-court action for damages under the second claim but elected not to retain jurisdiction over the cause of action.

Plaintiff believes that on the basis of the evidence, he will prevail before the NLRB and the Secretary of Labor, but is uncertain if either or both will provide the relief sought, namely to limit the supervisors and owners in their participation in union affairs without losing the rights of a labor organization to represent employees under the NLRA. If the defendants elected in December 1973 are permitted to take over these functions, he and other rank and file members will sustain irreparable injury for which there is no apparent remedy at law at this time. On the other hand, his continuance in office until these matters are resolved will assure that these members will have their rights under the NLRA protected.

Plaintiff therefore respectfully submits that a cause of action has been stated in the complaint which alleges that there has been a violation of his rights as a member under section 101

of the Act due to the granting of full membership rights to members who as a matter of law are not so entitled which is discriminatory against the rank and file members, which has been used to curb the dissent of rank and file members by outsiders in violation of plaintiff's rights for which the trial court ought to have granted relief and that on the basis of the facts, the trial court should have exercised its pendant jurisdiction to continue the status quo until the issues set forth in the complaint which overlap into the jurisdiction of the NLRB and the Secretary of Labor were resolved. Cf. Sheriden v. United Brotherhood of Carpenters 306 F. 2d 152, 156 (C.A. 3, 1962) where the court held that if a substantial claim is asserted under Title I, the federal court had jurisdiction, irrespective of the ultimate decision on the merits. In accord, Libutti v. DiBrizzi, supra.

II

PLAINTIFF'S RIGHT AS A MEMBER UNDER SECTIONS 101(a)(1) and (2) AS WELL AS 101(a)(5) OF THE LMRDA WERE VIOLATED BY THE DEFENDANTS

The second issue here relates to plaintiff's claim that he was constructively removed from his position because of his insistence that supervisors and owners refrain from participating in the affairs of the defendant union insofar as they affected negotiations and contract administration. There is no dispute that as a member the plaintiff has a right under sections 101(a)(1) and (2) of the Act to express his opinions and to take appropriate legal action to advance his claims against other members or the organization itself, whether such actions are expressed at the union meeting or through the filing of a complaint with the NLRB or the International President of the United Association.^{1/}

The trial court rejected this claim on the grounds that (1) section 101 was not available to protect a member against A special election, (2) that the election was held in conformity with the United Association's Constitution and (3) that section 101 gives no rights to a removed official as an official under the Act. Plaintiff submits that the trial court erred in so doing.

In the first place, there is no claim being made here that plaintiff was being disqualified to run for office. What is claimed is that plaintiff's protest that ineligible members were participating in the election processes and interfering with the rights of rank and file members accorded them under the NLRA.

^{1/} Farowitz v. Associated Musicians of Greater New York, Local 802, 330 F. 2d 445, 52 LRRM 2908 (C.A. 2, 1964); Salzhandler v. Caputo, 316 F. 2d 445, 52 LRRM 2908 (C.A. 2, 1963) cert. den. 375 U.S. 946 (1963); Fulton Lodge No. 2, IAM v. Nix, 415 F. 2d 212, 71 LRRM 3124 (C.A.5, 1969).

Title I was designed to promote union democracy for the rank and file and not to foster control by supervisors and owners of Taft-Hartley labor organizations. One cannot legitimize defendants' actions by arguing that their action in calling for a special election promotes the objectives of union democracy without ignoring the basic fact that the Act was designed to promote union democracy for the rank and file and free them from the domination of supervisors and owners who were members of that type of organization.

Secondly, the fact that the union nominally was complying with the provisions of the United Association Constitution by changing the nomination and election date does not remove from the case the motivation which prompted this action. The trial court accepts as the motivation the desire to conform. However, the record is bare of any other motive for such change except to discriminate and penalize plaintiff for his action in attempting to limit the role of supervisors and owners in the affairs of the defendant labor organization. First, the time for nomination and elections for the local union was expressed established with the United Association's consent in 1971 when the same Constitutional time provisions were in force. Second, the 1971 Convention of the United Association did not make such change mandatory, as it did with respect to the filling of vacancies. Third, there was no evidence that the change was demanded by the United Association at any time. Since the present United Association Constitution was adopted in 1971, it would appear logical to expect that if such change was mandatory ,

would have been delivered to the defendant local union long ago. astly, the aborted "removal" charge which was never processed serves as an indicator for the true purpose for the adoption of the change. If there had been a genuine concern for compliance, the only method by which the plaintiff's rights and the Constitution could lawfully be reconciled would have been to advance the nomination and election dates to May and June, respectively, with a one month temporary appointment.

No case has been found involving the right of a local union to amend its constitution and by-laws to defeat a member's right to hold office where the motivation for such change was a desire to punish by removal a member who had filed an unfair labor practice charge which affected a substantial number of other members. In Hartner v. Joint Board, ___ F. Supp. ___. 80 LRRM 2246, 2251 (D.C. My, 1972), the court considered the motivation for an amendment to the constitution and concluded that the change was legitimately motivated because sound reasons existed for the change, the amendment was supported by affiliated locals and freely and properly adopted. We submit that in the present case, the true motivation was as described, although the surface reasons might lead to a contrary conclusion. In addition, here the very persons who are under attack and seek revenge voted for the amendment in spite of their apparent disqualification to do so under the NLRA. The inclusion of their votes to pass the amendment created a "patent" inequality of voting which in Stettner v. International Printing Pressmen and Assistants Union of North America, 278 F. Supp. 675, 67 LRRM 2308 (DC Tenn., 1967) was held to violate plaintiff's rights under section 101(a)(1) of the Act.

Thirdly, the complaint seeks a vindication of plaintiff's rights under sections which violate his rights under sections 101(a)(1) and (2), as well as 101(a)(5) in which removal as an officer is a part of the general scheme to thwart plaintiff's right to express his opinion and to prosecute his unfair labor complaint with the NLRB. We submit that this is a deliberate act which was designed to curb dissent within the union, and while the duration of such anti-plaintiff activities may be of a relatively short, it was nonetheless most effective. Panza offers some support therefore for plaintiff's claim under these sections.

In DeCampliv. Greeley, 293 F. Supp. 746, 69 LRRM 2786 (D.C.N.J. 1968) the court reviewed the two lines of cases dealing with rights of member-officers against removal from office without violating the Act. He concluded with the observation that "in the accomplishment of the democratic purposes expressly sought by the Act, it was the design of Congress to extend Title I rights to all union personnel, be they officers, employees, or 'rank and file members.'" The fact that the union did not approved the ouster in that case may distinguish it on a factual level from the case at bar, as the trial court noted. but there is no distinction to be drawn as to whether the principle involved is applicable. In other cases where the dismissal was for "political purposes" court have ruled officer's rights under the Act were violated. Cf. Retail Clerk's Union, Local 648 v. Retail Clerk's International Ass'n. 299 F. Supp. 1012, 70 LRRM 3366 (D.C.D.C., 1969); Cefalo v. Inter. Union of Dist. 50, U.I.W.A., 311 F. Supp. 946, 73 LRRM 2929 (D.C.D.C., 1973)

Plaintiff contends that under the facts here, the actions taken to shorten plaintiff's term as Business Manager because of his insistence that supervisors and owners refrain from participating in matters which by law are outside their rights as members-employees under the NLRA constitutes a violation of his rights as a member per se under sections 101(a)(1) and (2) of the Act because such action interferes with his right to express his opinion- freely and to take action against fellow members which are in furtherance of the interests of the rank and file membership. The "special election was used as an alternative to the removal charge and constitutes a violation of plaintiff's rights under section 101(a)(5) of the Act.

CONCLUSION

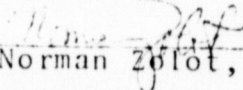
Plaintiff contends that the trial court erred in holding that the complaint failed to state a cause of action under sections 101(a)(1), (2) and (5) of the Act upon which relief may be granted under section 102 thereof. He seeks by this appeal a reversal of the trial court's decision dismissing the complaint and direction to the trial court to hear the merits of the complaint. In addition, plaintiff seeks a continuation of the temporary restraining order or a temporary injunction pending the determination of the merits of the complaint by the trial court.

Respectfully submitted,
EMANUEL C. RUSSO, Plaintiff

By Norman Zolot
Norman Zolot, His Attorney
9 Washington Avenue
Hamden, Conn. 06518

CERTIFICATION OF SERVICE

I hereby certify that two copies of the Brief and Appendix were mailed, postage prepaid to Elio Bellucci, Esq.
1341 Main Street, Springfield, Mass. 01103, the 16th day
of February 1974.


Norman Zolot, Attorney

Labor-Management Reporting and Disclosure Act of 1959

* * * * *

DEFINITIONS

SEC. 3. For the purposes of titles I, II, III, IV, V (except section 505), and VI of this Act—

* * * * *

(f) "Employee" means any individual employed by an employer, and includes any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice or because of exclusion or expulsion from a labor organization in any manner or for any reason inconsistent with the requirements of this Act.

* * * * *

(o) "Member" or "member in good standing", when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization.

* * * * *

TITLE I—BILL OF RIGHTS OF MEMBERS OF LABOR ORGANIZATIONS

BILL OF RIGHTS

SEC. 101. (a) (1) **EQUAL RIGHTS.**—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) **FREEDOM OF SPEECH AND ASSEMBLY.**—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business property before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

* * * * *

(4) PROTECTION OF THE RIGHT TO SUE.—No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further*, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) SAFEGUARDS AGAINST IMPROPER DISCIPLINARY ACTION.—No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

(b) Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

LABOR MANAGEMENT LABOR RELATIONS ACT
OF 1947, AS AMENDED

* * * * *

"DEFINITIONS

"SEC. 2. When used in this Act—
* * * * *

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

"(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.